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Federal Jurisdiction -- Expansion of the Civil Rights Act of 1871

Charles M. Brown Jr.

congressional mandate necessary. The FCC's previous controls over CATV have proven unsatisfactory.[50] The FCC, since 1966 when it assumed jurisdiction over CATV systems has requested clarifying guidelines from Congress, but Congress has refused.[51] Moreover, Congress deleted the provision relating to CATV in its present revision of the 1909 Copyright Act.[52] The FCC, with or without congressional guidelines, is the logical governmental agency to resolve most adequately and amicably the competing private, public, and economic interests involved in CATV transmission of copyrighted works. In light of the inaction of Congress and the *Southwestern Cable* decision, the FCC should adopt its own policies to protect the small local stations, the copyright holder, and CATV, thereby accommodating the growth of CATV and of new stations in local areas.

ERIC MILLS HOLMES

Federal Jurisdiction—Expansion of the Civil Rights Act of 1871

The Civil Rights Act of 1871[1] creates a federal cause of action for persons who are deprived of constitutionally guaranteed rights by anyone acting under color of state law. Notwithstanding the broad language,[2] courts have generally restricted the use of this statute to members of minority groups who encounter difficulty in receiving a fair hearing in state courts.[3] As a result, the unlawful actions that most often have been

[50] For excellent discussions of this aspect of the CATV dilemma see Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965); Note, *On a Clear Day* 1505. The authority of the FCC to act is unclear, and requests for clarifying guidelines from Congress have, to date, received no final action. RUCKER 178.

[51] It has been most difficult to get Congress to act because of the pressure from broadcasters and CATV lobbies. Note, *CATV Not Copyright Infringment*, 863 n.45. One writer stated that the "reason for all the delays . . . was because nearly a third of the Senate had at least remote financial interests in CATV." Comment, *The Final Decision* 406.

[52] For a summary of the present state of the copyright revision bill, see 392 U.S. at 396 n.17.

[1] 42 U.S.C. § 1983 (1964).

[2] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[3] *See, e.g.*, Lee v. Washington, 390 U.S. 333 (1968) (Negroes); CORE v.

dealt with include racial segregation in public accommodations and facilities[4] and in educational facilities,[5] unequal employment opportunities,[6] and similar acts of discrimination.

The judicial limitations on the use of the statute apparently are based on its history and the supposed intent of Congress. The main purpose of the Civil Rights Act was to aid Negroes in their struggle to gain full constitutional rights as guaranteed them by the fourteenth amendment.[7] Conditions that existed in the United States at the time of passage,[8] the title of the bill,[9] and the legislative history[10] all indicate a purpose to help Negroes gain their full rights. In the United States Supreme Court case of *Haig v. CIO*,[11] Justice Stone indicated that the statute should be used to enforce civil rights only. Pointing out that a jurisdictional amount is required for general federal question jurisdiction,[12] whereas no minimum amount in controversy is required for jurisdiction under section 1983, he reasoned that litigants should not be allowed to evade the jurisdictional amount requirement by invoking section 1983 when their claim was capable of monetary evaluation. The Supreme Court, in the later cases of *McNeese v. Board of Education*[13] and *Monroe v. Pape*,[14] concluded that

Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (Negroes and Puerto Ricans); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (state prisoners); *contra, e.g.*, Jordan v. Kelly, 223 F. Supp. 731 (W.D. Mo. 1963).

[4] *See, e.g.*, Fleming v. South Carolina Elec. & Gas Co., 239 F.2d 277 (4th Cir. 1956) (segregated bus seating); Brooks v. Tallahassee, 202 F. Supp. 56 (N.D. Fla. 1961) (separate waiting rooms and lunch counters at municipal airport); Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953) (denial of admission to municipal swimming pool).

[5] *See, e.g.*, Hill v. Board of Educ., 390 F.2d 583 (6th Cir. 1968) (Negro teacher's right to employment when school integrated); School Bd. v. Kilby, 259 F.2d 497 (4th Cir. 1958) (school open for white students only); Holmes v. Danner, 191 F. Supp. 394 (M.D. Ga. 1961) (admission to public college).

[6] *See, e.g.*, Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) (Negro physician); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963) (Negro attorneys).

[7] Monroe v. Pape, 365 U.S. 167, 171 (1961); Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967); United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 10 (E.D. Pa. 1965); Francis v. Lyman, 108 F. Supp. 884, 888 (D. Mass. 1952), *aff'd*, 203 F.2d 809 (1st Cir. 1953).

[8] *See* Monroe v. Pape, 365 U.S. 167, 173-74 (1961).

[9] "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13 (1871). The popular name was the Ku Klux Act of April 20, 1871.

[10] *See generally* Monroe v. Pape, 365 U.S. 167, 171-87 (1961).

[11] 307 U.S. 496 (1939).

[12] 28 U.S.C. § 1331 (1964).

[13] 373 U.S. 668 (1963).

[14] 365 U.S. 167 (1961).

the statute was passed to provide a remedy where none was available.[15] Implicit in these decisions is the Court's recognition of Congressional intent to help minority groups, since members of the dominant group usually receive a fair hearing in state courts.[16]

Two recent cases, however, held that federal courts had jurisdiction under this statute even though the historic minority group test was not met. In *Joseph v. Rowlen*,[17] plaintiff was selling cooking utensils on the street when he was arrested by defendant-policeman. Plaintiff alleged that the arrest was made upon the basis of second-hand, unsupported reports that he was annoying pedestrians and was, therefore, without probable cause and in violation of the due process clause. The federal district court directed a verdict for defendant, holding that the deprivation of rights complained of must be part of a systematic policy of discrimination against a class or group of persons to support a claim under section 1983.[18] The court of appeals, however, ruled that the cases relied on by the district court were no longer valid[19] and remanded the case for trial.

In *Meredith v. Allen County War Memorial Hospital Commission*,[20] plaintiff, a physician on the staff of the county hospital, was refused reappointment to the staff following a hearing by the commission, which, plaintiff alleged, did not comport with the requirements of due process. The district court dismissed for lack of subject matter jurisdiction, apparently upon reasoning similar to that used by the district court in *Joseph*.[21] But the court of appeals, neglecting the question of plaintiff's status to sue, addressed itself to questions dealing with whether the defendants could be held liable under the statute and whether a guaranteed right of plaintiff's had been denied him. All literal elements of the statute being met, the district court was held to have jurisdiction, and the case was remanded for trial.[22]

The jurisdictional facts in these two cases are dissimilar to cases in which the courts historically have recognized jurisdiction under section 1983. In one case a policeman apparently made an error in judgment

[15] 373 U.S. at 671-72; 365 U.S. at 480. For an example of a lower court's view, see Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955).

[16] *Contra, e.g.*, Jordan v. Kelly, 223 F. Supp. 731 (W.D. Mo. 1963).

[17] 402 F.2d 367 (7th Cir. 1968). The district court's opinion was not published.

[18] 402 F.2d at 368-69. The cases relied on were Truitt v. Illinois, 278 F.2d 819 (7th Cir. 1960); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959).

[19] 402 F.2d at 369.

[20] 397 F.2d 33 (6th Cir. 1968). The district court's opinion was not published.

[21] *See id.* at 36 (dissenting opinion of Phillips, J.).

[22] 397 F.2d at 34-36.

by arresting a salesman without probable cause; in the other, a hospital board failed to allow a doctor to answer charges of misconduct before dismissing him. There was neither claim nor evidence of minority group discrimination. On the contrary, it was implicit in the results reached by the trial courts that none was involved.

The court of appeals in *Joseph* indicated a belief that the minority group test had not survived the Supreme Court decision in *Monroe v. Pape*.[23] In *Monroe*, the same court of appeals had upheld a finding of no jurisdiction when Monroe accused Pape, a police officer, of illegal entry and search of his home.[24] The Supreme Court, however, reversed,[25] holding that an entry exceeding a policeman's authority was under color of state law. It further held that there is no requirement for jurisdiction under section 1983 that plaintiff's rights be abridged as a result of "a specific intent to deprive a person of a federal right,"[26] but that the statute should be used to "afford a federal right in federal court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced . . . ."[27]

Although the Supreme Court did not mention the minority group test,[28] the court of appeals indicated that the language that eliminated the specific intent test also required discontinuing the minority group test. Monroe, however, was a member of a minority group;[29] thus, even if the Court had indicated that the minority group test was not a requirement for jurisdiction under section 1983, it would have been dictum. Since the Supreme Court's lengthy and thorough opinion explicitly eliminated only the requirement of a specific intent to deprive federal rights, the decision in *Monroe* did not necessarily require the abandonment of the minority group test in determining jurisdiction under section 1983.[30]

In *Meredith*, the court of appeals concerned itself with the problems of "under color of" state law, the requirements of due process, and the defenses and immunities raised by defendants.[31] It apparently read the language of the statute strictly as written and neglected to consider the

[23] 365 U.S. 167 (1961).
[24] Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959).
[25] 365 U.S. 167 (1961).
[26] *Id.* at 187.
[27] *Id.* at 180.
[28] 402 F.2d at 369.
[29] 365 U.S. at 203.
[30] *But cf.* Cohen v. Norris, 300 F.2d 24, 29 (9th Cir. 1962), expressly overruling a similar doctrine, after *Monroe* was decided by the Supreme Court.
[31] 397 F.2d at 35-36.

limitation generally imposed by judicial interpretation. Although apparent Congressional intent should not be absolutely binding in the interpretation of enactments, such a clearly expressed and judicially accepted intent[32] should not be be ignored without explanation.[33]

Various courts, including the one that decided *Joseph*, have denounced the desirability or intention of transforming every case in which a plaintiff can urge state discrimination into a federal action.[34] That result seems inevitable, however, if the decisions in *Joseph* and *Meredith* are followed. It may not be desirable to allow this new source of cases into federal courts in situations where the state court is both available and effective, and is in fact often the court best suited to decide the case.[35] Increasingly evident today is a desire to restrict federal jurisdiction. Many federal courts more readily abstain from hearing questions that could be decided on state law,[36] and there are proposals to limit federal jurisdiction by statute.[37] To needlessly expand the jurisdiction—and consequently the workloads—of the federal courts through an expanded interpretation of section 1983 seems undesirable.

CHARLES M. BROWN, JR.

Federal Jurisdiction—Manufactured Diversity Disassembled

In the recent case of *McSparren v. Weist*,[1] the Court of Appeals for the Third Circuit, reversing its own prior decisions, held that the appointment of an out-of-state guardian of a minor for the purpose of creating diversity was an assignment improperly invoking jurisdiction under

[32] Cases cited notes 7-15 *supra*.

[33] *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

[34] 402 F.2d at 369 & n.6.

[35] *See generally* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1965); Marden, *Reshaping Diversity Jurisdiction*, 54 A.B.A.J. 453, 455 (1968).

[36] Although the recent cases of Dombrowski v. Pfister, 380 U.S. 479 (1965), and Baggett v. Bullitt, 377 U.S. 360 (1964), have expanded the use of pendent jurisdiction by restricting the doctrine of abstention, the lower federal courts still abstain in many cases. See, *e.g.*, Zwickler v. Koota, 261 F. Supp. 985 (1966), *rev'd*, 389 U.S. 241 (1967). It is a widely held belief that "state courts should be the primary source of interpretation and application of state law." Marden, *Reshaping Diversity Jurisdiction*, 54 A.B.A.J. 453, 455 (1968).

[37] *See* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1965).

[1] 402 F.2d 867 (3d Cir. 1968).